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SUPREME COURT, U.S.

No. 05-1450

In The Supreme Court of the United States

V. STEPHEN MOORE, and others similarly situated,

Petitioners,

vs.

ACCENTURE, LLP, ACCENTURE UNITED STATES BASIC LIFE/ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE PLAN, ACCENTURE UNITED STATES GROUP DENTAL PLAN, ACCENTURE UNITED STATES GROUP MEDICAL PLAN, ACCENTURE UNITED STATES OPTIONAL ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE PLAN, and ACCENTURE UNITED STATES OPTIONAL LIFE INSURANCE PLAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF

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REPLY TO RESPONDENTS' STATEMENT OF THE CASE

While Accenture, *et al.* states that Plaintiff Moore has mischaracterized the facts in his Statement of the Case, it is in fact Accenture, *et al.* that omits several key facts in its Counter-Statement of the Case. Plaintiff Moore did in fact file two Charges of Discrimination with the EEOC, however, only one of those was filed "at about the same time" as the putative class action at hand. Plaintiff Moore filed a Charge of Discrimination with the EEOC based upon disability discrimination on August 5, 2004. Plaintiff Moore also filed a Charge of Discrimination with the EEOC based upon age discrimination on October 18, 2004. Plaintiff Moore then filed the instant lawsuit on October 25, 2004. Importantly, Accenture, *et al.* fails to point out that both of the charges filed at the EEOC "were class action charges" on behalf of Plaintiff Moore and others similarly situated.

Accenture, *et al.* also correctly points out that the EEOC referred the Charge of Discrimination to the alternative dispute resolution system within the EEOC after Accenture, *et al.* agreed to mediate. Accenture, *et al.* is again correct in stating that there was no mediation, because, the mediation was cancelled after Accenture, *et al.* decided not to mediate despite initially agreeing to mediation.[1]

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[1] Accenture, *et al.* does correctly point out that there was no formal agreement between the parties that the complaint would be dismissed if Accenture, *et al.* agreed to mediate; however, no agreement was necessary because Accenture, *et al.* had already agreed to mediate. Moreover, Plaintiff Moore never stated or implied that such an agreement existed.

(Continued on following page)

REASONS FOR GRANTING THE PETITION

Accenture, *et al.'s* primary argument seems to be that Plaintiff Moore failed to raise the conflicts of law addressed in Plaintiff Moore's brief at the District Court. The conflicts of law relate to the notice requirements of a class action dismissal and the split in the circuits over the granting of attorneys' fees in an ERISA action.

Accenture, *et al.* argues that there is no split in the circuits as to the notice requirement required when dismissing a class action complaint. Accenture, *et al.* stated that the decision in *Doe v. Lexington-Fayette County Gov't*, 407 F.3d 755, 761 (6th Cir. 2005), made two years after the 2003 amendment, does not apply to this post amendment case. However, *Doe* is the only post 2003 amendment that address this issue and was in fact decided post-amendment. In the event that *Doe* does not apply to the post-amendment rule, then this is a case of first impression and this Court must make clear the notice requirements for parties to voluntarily dismiss putative class action complaints.

Accenture, *et al.* fails entirely to address Plaintiff Moores argument that the Court failed to properly analyze Plaintiff Moore's claim for attorneys' fees as a prevailing party in an ERISA action pursuant to *Hummell*. *Hummell v. S.E. Rycoff & Co.*, 634 F.2d 446 (9th Cir. 1980). Pursuant to *Hummell*, Courts consider the following factors when determining whether to award attorneys' fees under ERISA:

This is just another example of the Accenture, *et al.'s* bad faith throughout this entire process.

> (1) the degree of opposing parties' culpability of bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of attorneys' fees against opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan; and (5) the relative merits of the parties' positions. *Id.*

As outlined in the Petition for Certiorari, the factors clearly weigh in favor of a fee award for Plaintiff Moore and the class under ERISA. This Court must at a minimum remand this case to the District Court so that an analysis can be conducted to determine if an award of attorneys' fees is appropriate.

Accenture, *et al.* also relies heavily on an alleged failure of Plaintiff Moore to raise these issues at the District Court. However, based upon the improper dismissal of the complaint, Plaintiff Moore did not have an opportunity below to raise these issues. There was no motion to dismiss to respond to, nor a motion for summary judgment, which would have provided Plaintiff Moore the opportunity to raise these issues. Plaintiff Moore raised the issues at the earliest possible time, which was on appeal. Plaintiff Moore did not address the failure to notify the class of the dismissal in his motion for fees as that issue was not germane to that motion.

Furthermore, even assuming *arguendo* that Plaintiff Moore did fail to raise the arguments addressed above at the District Court when an issue on appeal is that of a plain error, then this Court may review regardless of whether it was raised in the courts below. Supreme Court Rule 24.1(a) states that "the Court may consider a plain

error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." S. Ct. Rule 24.1(a). Furthermore, "federal courts have recognized that in federal civil cases, the Courts of Appeals have the power to note plain errors on the record even though such errors were not raised or were not properly raised by the parties." 5 Am. Jur. 2D § 767 (1995).

The theory that plain error is reviewable by this Court even if not properly raised at the district court is consistent with the Court's holding in *Sibbach v. Wilson & Co.* 312 U.S. 655, 61 S. Ct. 422 (1941). In that case the issue decided was not even raised on appeal at the circuit court; however, this Court raised the issue because it was plain error. In the instant case, it was plain error for the court to dismiss the class action complaint without making a determination as to whether notice was required; it was also plain error for the court to deny Plaintiff Moore's motion for fees without analyzing the case pursuant to *Hummell*. When the error addressed is, as in this case, plain error, this Court has the power to review the matter even if it is not addressed in the courts below.

CONCLUSION

For the reasons addressed in the Petition for Certiorari and in this Reply, the petition should be granted because the district court allowed the court clerk to dismiss the action on behalf of the class when clearly the court had additional duties to perform before the dismissal should have been allowed. Moreover, the trial court failed

at a minimum to address the *Hummell* factors when denying Plaintiff Moore's motion for fees under ERISA.

Respectfully submitted,

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